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FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-290

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

v.

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS,
Attorney General of the State of New York,

Appellees.

On Appeal From the Court of Appeals of New York

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

Counsel of Record:
DAVID A. ROSS
DECHERT PRICE & RHOADS
Eleven Broadway
New York, NY 10004
(212) 425-3510
Attorney for Appellant
The Equitable Life Assurance Society of the United States

Of Counsel:
GALE G. MOSCOW
H. FRANCIS DELONE, JR.

October 22, 1982

International Printing Co., 711 So. 60th St., Phila., Pa. 19143 — Tel. (215) 727-6711

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"Hideously inequitable" is the term a recent study, prepared by the Dean of New York University's Graduate School of Public Administration and commissioned by the City of New York, used to describe the real property assessment practices of New York City. *Study for City Calls Realty Tax 'Hideously Inequitable'*, N. Y. Times, Apr. 24, 1981, § 1, at 1, col. 2. Despite the inequity in

assessment practices of New York City, which "can fairly be described as a classification system with 830,000 classes —each parcel of real property is its own class—and the rate of tax for each class determined by neither the State Constitution, State law or the legislative bodies of the City of New York," there have been no real estate tax inequality challenges within the City for approximately eighty years. *Real Property Tax Policy for New York City,* "A study conducted under contract with the Department of Finance, City of New York, by Graduate School of Public Administration, New York University" December 31, 1980 at I-2. *See Colt Industries, Inc. v. Finance Administrator of the City of New York,* N. Y. L. J., June 4, 1980, at 10, col. 2 (Sup. Ct. N. Y. Co., June 12, 1980) (A at 27),[1] *aff'd,* 81 A. D. 2d 777, 439 N. Y. S. 2d 385 (1st Dept. 1981), *aff'd in part, mod. in part,* 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982).

Appellee, Robert Abrams, Attorney General of the State of New York ("State"), correctly concludes that income-producing property owners, who previously failed to prosecute their tax certiorari petitions, began to notice the proceedings for trial on the basis of inequality of assessment when it became apparent that an effective remedy to redress such inequality was available. S. M. at 5.[2] The perceived effective remedy derived from a State legislative enactment and a decision of the Court of Appeals of New York. First, in 1969, the Legislature amended New York Real Property Tax Law § 720(3), Act of April 27, 1969, ch. 302, McKinney's 1969 New York Session Laws 399, and permitted exclusive reliance upon the State Equalization Rate in real property tax proceedings predi-

1. Appendix references are to the appendix to the Jurisdictional Statement and are designated "A".

2. The Motion to Dismiss or Affirm of the State is designated "S. M."; the Motion to Dismiss or Affirm of the Finance Administration and the Tax Commission of the City of New York ("City") is designated "C. M.".

cated upon a claimed inequality of assessment. The State Equalization Rate measures the aggregate ratio of assessed values-to-fair market values within an assessing unit. Next, the Court of Appeals, in *Ed Guth Realty, Inc. v. Gingold*, 34 N. Y. 2d 440, 447-450, 358 N. Y. S. 2d 367, 371-373 (1974), held that the State Equalization Rate is the most objective evidence of inequality of assessment, is arrived at expertly, and as such is competent evidence in real estate tax proceedings. (S. M. at 4-5).

The statute challenged herein, Act of December 3, 1981, ch. 1057, § 7, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp. at 1981-233) ("L. 1981, ch. 1057, § 7"), which deprives City real property taxpayers of the right to rely on the State Equalization Rate to establish violations of the right to uniform and equal assessment practices, effectively restores to New York City the historic freedom from challenge of its unequal assessment practices.

The State and the City of New York urge that this Court lacks jurisdiction to disturb the City's freedom from challenge to its unequal assessment practices. This brief demonstrates that their arguments are without merit.

JURISDICTION LIES IN THIS COURT

The decision of the New York Court of Appeals is a final judgment or decree within the scope of 28 U. S. C. § 1257. A tax review proceeding predicated upon a claim of inequality of assessment is a bifurcated proceeding in which there is an initial trial of the issue of the aggregate ratio of assessed values-to-fair market values within the assessing unit. The second aspect of the proceeding is a trial of the fair market value of the property whose specific tax assessment is challenged. The ratio established in the initial trial is applied to the value determined in the second stage. *Slewett & Farber v. Board of Assessors, Nassau County*, 54 N. Y. 2d 547, 555, 446 N. Y. S. 2d 241, 243 (1982); S. M. at 3; C. M. at 3. The decision of the Court of Appeals on the federal issue presented herein pre-ordains the outcome of further proceedings: Appellant, the Equitable Life Assurance Society of the United States ("Equitable"), is precluded from using the State Equalization Rate to establish the aggregate ratio of assessed values-to-fair market values in the City; the cost of the sales and selected parcels methods of proof precludes Equitable from using either, or both, of these methods to establish the *de facto* standard of assessment within the City; no other remedy is statutorily available. J. S. at 12-14.[3] Were Equitable to proceed solely with the valuation issue, the trial court would be required to apply the *de jure* full value assessment standard, not the *de facto* standard sought by Equitable. *See People ex rel. Parklin Operating Corp. v. Miller*, 287 N. Y. 126, 128-29 (1941). Thus, the issue of whether Equitable's property has been assessed at a greater percentage of full value than that percentage generally prevailing in the City effectively cannot be addressed. The outcome of the case is pre-ordained. The federal question presented herein and at each judicial level is the controlling question. There is no additional remaining federal question; nor will there be. In these circumstances, jurisdiction lies in this Court. *Cox Broad-*

3. The Jurisdictional Statement is designated "J. S.".

casting Corp. v. Cohn, 420 U. S. 469, 479 (1975); *Pope v. Atlantic C. L. R. Co.*, 345 U. S. 379, 381-383 (1953); *Mills v. Alabama*, 384 U. S. 214, 217-218 (1966).

Appellees urge that the decision of the Court of Appeals pertains solely to the facial validity of L. 1981, ch. 1057, § 7 and not to the constitutionality of the statute as applied. S. M. at 12; C. M. at 8. The Court of Appeals, however, unequivocally stated: "[W]e hold this section of the Real Property Tax Law [L. 1981, ch. 1057, § 7], as enacted on December 3, 1981, to be constitutional." *Colt Industries, Inc. v. Finance Administration of the City of New York*, 54 N. Y. 2d 533, 544, 446 N. Y. S. 2d 237, 240 (1982) (A at 6). Moreover, Appellees have drawn a distinction without a difference. It is clear that a lower court, being required to follow the mandates of the Court of Appeals, will apply the statute so as to deny Equitable use of the State Equalization Rate to establish the inequality of its real property assessments.

Secondly, even were Equitable to proceed with the valuation trial, the issue of whether its assessments are unequal *vis-à-vis* that of all other property in the City effectively cannot be determined in light of the decision of the Court of Appeals that Equitable is precluded from relying upon the State Equalization Rate. The only issue which would be reviewable in further State proceedings is the correctness of the valuation decision—an issue which hardly presents a federal question. Therefore, the situation presented herein also falls within the second category of cases enunciated in *Cox Broadcasting Corp. v. Cohn*, *supra*, 384 U. S. at 480, "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *See American Export Lines, Inc. v. Alvez*, 446 U. S. 274, 279 (1980); *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 123-27 (1945).

For the foregoing reasons, the decision of the Court of Appeals on the federal issue should be deemed a final judgment for the purposes of 28 U. S. C. § 1257. *Cox Broadcasting Corp. v. Cohn, supra*, 420 U. S. at 477.

THE FEDERAL QUESTION IS SUBSTANTIAL

In their attempt to defeat Equitable's position that this Court should note probable jurisdiction of this appeal, Appellees incorrectly assert: 1) that the decision of the Court of Appeals relates to a procedural issue which is a matter of state and local concern; 2) that Equitable may establish the aggregate ratio of assessed values-to-market values by use of sales and selected parcels methods of proof; and 3) that, in any event, Equitable can be compensated for the costs of proving the aggregate ratio. S. M. at 15, 12, 13; C. M. at 7, 9, 8.

As evidenced by the Record (Haims Affidavit; A at 48-49), use of the sales and selected parcels methods of proving the *de facto* standard of assessment for just one of the geographic sections in New York City would cost approximately $3,000,000.[4] By extrapolation, it is easy to see that the cost of establishing the *de facto* standard of assessment for the entire City of New York by use of these methods would be astronomical. In contrast to the overwhelming costs of proving the City-wide *de facto* standard of assessment, Equitable's potential recovery is small. For example, with respect to the property located at 645 Madison Avenue, Equitable's maximum potential recovery is $2,721,900.[5]

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4. Manhattan has 8 such sections; the other four boroughs in New York City comprise approximately 90 such sections.

5. This figure is derived from the claimed values, claimed equalization rates and actual assessments which appear in each petition and were part of the Record in the Court of Appeals. The sum is the result of the following processes: (1) the claimed fair market value of the property is multiplied by the claimed equalization rate for each tax year at issue, (2) the products, which represent the equalized claimed values, are subtracted from the corresponding actual annual assessments, (3) the difference for each tax year is multiplied by the appropriate actual tax rate.

The maximum potential recovery with respect to the property located at 717 Fifth Avenue, as calculated from figures appearing in the Record, is $3,540,985.

The Court of Appeals in this case held that Equitable has the right to proceed on a whole-roll basis of comparison.[6] Given the fact that under New York law a taxpayer has the legal right to have its property assessed at the prevailing City-wide rate and given the astronomical costs of proving such rate in New York City by use of the sales and selected parcels methods, the Appellees' assertion that the decision of the Court of Appeals concerns only a "procedural" matter is meaningless. The effect of the decision is substantial, regardless of the characterization applied to its subject matter.

Moreover, Equitable has established that denial of the use of the State Equalization Rate in challenges to real property assessments predicated upon claimed inequality of assessment is outcome-determinative and, therefore, substantive. *See Guaranty Trust Co. v. York*, 326 U. S. 99, 109, *reh'g denied*, 326 U. S. 806 (1945). If, as asserted by the City and State, such a denial is merely procedural in nature and the sales and selected parcels methods of proof do provide real remedies, why has no City taxpayer proceeded with an inequality of assessment challenge for the past eighty years? Whatever appellation is attributed to the denial of the use of the State Equalization Rate, its constitutional impact cannot be denied.

The cases cited by both the City and the State for the proposition that the sales and selected parcels methods of

6. Equitable at every step of the proceedings has asserted its right to have its assessments reviewed on a whole-roll basis, *i.e.*, a City-wide basis. The cost estimate in the Haims Affidavit, however, was prepared in accordance with the ruling of the trial court in *Colt Industries, Inc. v. Finance Administration of the City of New York*, *supra*, that a valid classification system of assessment exists in New York City and that an inequality challenge in the City may proceed only on the basis of a comparison of the challenged assessment with that of comparable (like-kind) properties within a section of the City. The Court of Appeals rejected the lower court's conclusion in *Colt Industries, Inc.*, *supra*, when it considered this issue on appeal. 54 N. Y. 2d at 541, 446 N. Y. S. 2d at 238 (A at 2).

proof are real, not illusory, remedies are inapposite to the situation faced by New York City taxpayers. Each and every cited case involved properties in assessing units outside the City, where the costs of proving inequality of assessment by these methods would be substantially less. *See* S. M. at 12-13; C. M. at 8-9.

Finally, the State and Nassau County (as *Amicus Curiae*) have themselves implicitly admitted that the challenged statute is substantive. While asserting that the challenged statute is only procedural, the State itself has defeated this assertion by claiming: "[T]he automatic application of the state rate, once litigated, threatened units such as Nassau County and the City of New York (if the R. P. T. L. was applicable) with sudden exposure to the refund of billions of dollars in real property tax refunds [footnote omitted] . . . ." S. M. at 5.[7] The State's theme is echoed by the County of Nassau which indicates, at page 2 of its *Amicus Curiae* brief, that the County Executive directed sponsorship of the brief "[i]nasmuch as the evidentiary ratio issue can and will substantially affect the Treasury and Assessment Roll of the County of Nassau . . . ." These statements are implicit admissions not only of a widespread inequity in the system of real property tax assessments in these areas but also of the inability of taxpayers to present an effective challenge to that inequitable system by use of the sales and selected parcels methods. Legislation to insulate municipalities from purported financial harm or the consequences of illegal acts cannot be sustained, particularly when weighed against individual constitutional guarantees. *See Shapiro v. Thompson*, 394 U. S. 618, 633 (1969).

The fact that there is a statutory provision for the recovery of expenses in certain limited circumstances does not make remedial that which otherwise is a non-remedy. Section 716 of the New York Real Property Tax Law pro-

7. The State observes that "[i]n the City of New Yor' this exposure was reported at 1.7 to 2.7 billion dollars." S. M. at 5 (f.n.).

vides that recovery of expenses is possible only in those situations where, upon the refusal of an assessing unit to admit to a demanded ratio, the taxpayer "proves that the percentage of full value at which other real property in the assessing unit is assessed *is not in excess of the percentage specified in his demand* . . . ." (emphasis added).[8] Moreover, the court, upon application for recovery of expenses, need not order reimbursement if it finds that the assessing unit had good and sufficient reason for its failure to admit the ratio of assessment. *Id.* Thus, this statutory provision hardly is a guarantee of cost recoupment; nor is it an incentive to a taxpayer to spend millions of dollars

8. The full text of this section provides:

§ 716. Admission of percentage of full value at which real property is assessed.

1. Except in a proceeding to review a special franchise assessment, at any time after answer has been served or has been deemed made and not later than twenty days before the trial, the petitioner may serve upon the respondent a demand for admission for the purposes of such proceeding that the percentage of full value at which other real property is assessed in the unit is a percentage specified in such demand, but not in excess of ninety-five per centum. Unless the respondent within fifteen days after service of such demand, or within such further time as the court may allow on motion on notice, serves and files a notice specifically denying that the percentage specified in such demand is correct, such percentage shall be deemed admitted.

2. After being served with such demand if the respondent serves such a notice of denial, and the petitioner thereafter proves that the percentage of full value at which other real property is assessed in the assessing unit is not in excess of the percentage specified in his demand, he may apply to the court at or immediately following the trial for an order requiring the respondent to pay him the reasonable expenses incurred in making such proof including the reasonable fees of experts and attorneys. Unless the court finds that there was good and sufficient reason for the respondent's denial, the order shall be made irrespective of the results of the proceeding.

up-front inasmuch as he could find himself in the position of demanding admission of a fifty percent ratio and, upon denial of such demand, establishing a fifty-one percent ratio. In such an event, the taxpayer could not apply to recover the costs-of-proof even though he had substantially prevailed on his claims.

Thus, the decision of the Court of Appeals, precluding use of the State Equalization Rate to establish the violation of the right of a New York City real property taxpayer to equality of assessment, effectively denies challenge of unequal assessments. The federal question is substantial.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

David A. Ross
Member of the Bar of the
United States Supreme Court
Dechert Price & Rhoads
Eleven Broadway
New York, N. Y. 10004

Counsel of Record for Appellant
The Equitable Life Assurance
Society of the United States

Of Counsel:

Gale G. Moscow
H. Francis DeLone, Jr.

Dated: October 22, 1982